82-1173
No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

OPE SHIPPING, LTD., and EL PORVENIR SHIPPING COMPANY, Inc., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

VADOR SHIPPING, LTD., and CIA DE NAVEGACION LA LIBERTAD, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

AGUA SHIPPING, LTD., and CIA DE NAVEGACION CORINTO, S.A., et al.

UNDERWRITERS AT LLOYDS,

Petitioners,

–against–

DURAS SHIPPING, LTD., and MARINA MERCANTE NICARAGUENSE, S.A., et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED:

(1) Whether the violent taking by Sandinista crew elements of four Nicaraguan flag vessels, privately owned by Somoza, to ports in Cuba and Panama where they were detained by the Cuban and Panamanian authorities pending overthrow of the Somoza regime, and subsequently returned by Cuba and Panama to Nicaragua after establishment of the new Nicaraguan government on July 19, 1979 constituted "capture, seizure, arrest, restraint, detainment or confiscation by the government of the country in which the vessel is owned or registered" within the exclusionary language of the American Institute War Risk Clauses.

(2) Whether the subsequent retention of the vessels by the legitimate Sandinista government constituted retroactive validation of the previous actions taken with respect to the four vessels by the Sandinistas as a rebel government within the exclusionary language of the American Institute War Risk Clauses.

(3) Whether the marine insurance community is entitled to a definitive interpretation of the War Risk exclusionary language at bar for precedential guidelines in future cases and for complete harmony between American and English courts on the interpretation of that language.

LIST OF PARTIES:

The Petitioners have no parent companies, subsidiaries or affiliates, because Petitioners are individual Underwriters at Lloyd's appearing in suit under the representative name of Edward Alan Hermitage and all other Underwriters at Lloyds's, subscribing policy of War Risk Insurance No. 01/145005 through Messrs. Robt. Bradford Hobbs Savill, Ltd.

The only other parties in the proceedings before the United States Court of Appeals for the Second Circuit whose names are not listed in the caption were the Marine Risk Underwriters, Allstate Insurance Company, Inc., United States Fidelity and Guarantee Companies, Inc., and various British Underwriters who are not parties to the Petitioner herein because their dismissal below was affirmed by the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, War Risk Underwriters at Lloyd's, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW:

The opinion of the court of appeals (App.A infra. page A-1) was reported at 687 F. 2d 639. The opinion of the district court (App.B infra. page A-10) is reported at 521 F. Supp. 342.

JURISDICTION:

The judgment of the court of appeals was entered on August 30, 1982; a petition for rehearing was denied on November 5, 1982 (App. C infra. page A-26); a motion to file a second petition for rehearing was denied on December 14, 1982; and a motion to stay the mandate pending petition for certiorari was granted on December 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT:

The undisputed facts as found by both the trial and appellate courts involved four small cargo vessels, the EL SALVADOR, HOPE, and MANAGUA, owned by Panamanian corporations, and the HONDURAS, owned by Mamenic Line, a Nicaraguan Corporation, with the three Panamanian owned vessels all under long-term bareboat charter to Mamenic, and with the four vessels registered under the Nicaraguan flag. The four owning Panamanian and Nicaraguan corporations were all owned or controlled by the Somoza family. The four vessels valued at $1,000,000 each, were insured for Marine (Hull and Machinery) Risks with American Underwriters at Lloyd's (75%) and British Underwriters (25%), and for War Risks with Underwriters at Lloyd's (100%); and both policies were effective from May 15, 1979 to May 15, 1980.

On June 17, 1979 the Master of the HOPE was forced by armed Sandinista crewmembers to sail the vessel to Cuba where it was taken under control by the Cuban authorities. On June 22, 1979, the EL SALVADOR and HONDURAS were removed by armed Sandinista crewmembers from anchorage in the Canal Zone to Panamanian waters where the vessels were taken under control by the Panamanian Maritime National Guard, with the MANAGUA also taken by its crew from El Salvador to Panama. The four vessels were irrevocably lost to their owners as of June 17-22, 1979 because neither Cuba nor Panama would return the vessels because of their connection with Somoza.

By letters of June 24th and 28th, 1979 (App. D infra. pages A-28-29) General Somoza, as President of Mamenic Line, confirmed to his business associate Joseph Baittiner that the vessels had been seized and taken to Cuba and Panama, and he also confirmed previous verbal instructions that Mr. Baittiner take all necessary steps to protect all owned and chartered vessels including, *inter alia*, transferring the vessels to new corporations and new flags. On July 9, 1982 by a series of various corporate transactions, the vessel ownership purportedly was transferred from the former Panamanian and Nicaraguan corporations to newly formed Cayman Island corporations, and the vessels' registry under the Nicaraguan flag purportedly was cancelled. On July 13, 1979 the vessels were registered under the British flag in the Cayman Islands.

The historical facts established that Nicaragua had been engaged in civil strife through most of 1978 during which the Sandinistas were attempting to overthrow the Somoza regime, and that on June 7, 1979 General Somoza had declared Nicaragua to be in a state of seige. On June 18, 1979 the Sandinistas named a provisional government of five leaders (junta) which was recognized on June 22, 1979 by Panama; and on July 5, 1979 Somoza agreed to resign, and eventually fled the country on July 18, 1979. The Sandinistas took complete control of Nicaragua on July 20, 1979 and, on that same day, expropriated the entire business empire of Somoza.

The vessels were returned to Nicaragua by Cuba and Panama in August, 1979 after the Sandinistas had gained complete con-

trol of the Nicaraguan government. On September 28, 1979 the former Panamanian and Nicaraguan owners and the new Cayman Island owners instituted suit in the United States District Court for the Southern District of New York on alternative causes of action against the Marine Risk Underwriters and the War Risk Underwriters seeking to recover $1,000,000 for each of the four vessels. Nicaragua subsequently sold the vessels during 1980 to offset accrued port charges through condemnation proceedings instituted against the vessels and against the Cayman Island corporations as owners.

As evidenced by the caption of this case, separate suits were instituted on each of the four vessels in the name of the former owning corporations, and also the newly formed Cayman Island corporations, all as parties plaintiff, with each Complaint alleging the same alternative causes of action i. e. the loss was due to barratry of the crew, a covered peril under the Marine Risk (Hull) policy; or if not due to barratry, the loss must have resulted from a peril otherwise covered under the War Risk policy. The Marine Risk Underwriters asserted as complete defenses that the loss resulted (1) from the civil war in Nicaragua within the exclusionary language of the War, Strikes and Related Exclusions Clause of the American Institute Hull Clauses; and (2) from the assured's failure to take affirmative steps towards recovering the vessels in violation of their policy obligation under the Sue and Labor Clause.

War Risk Underwriters asserted as a complete defense that the loss resulted from capture, seizure, arrest, restraint, detainment, or confiscation by the country in which the vessels were owned or registered within the scope of Exclusion f of the American Institute Hull War Risks and Strikes Clauses. (App. E infra.)

The case proceeded to a bench trial before Judge Milton Pollack on June 2, 1981 but the prime movers in the corporate transactions, General Somoza and Mr. Joseph Baittiner, had been assassinated during September, 1980. In lieu thereof, the respondents produced Mr. Renaldy Guttierrez, an expatriate Nicaraguan lawyer residing in Miami, affiliated with the Somoza

family and subsequently appointed to succeed the late Mr. Baittiner as President of the plaintiff's Cayman Island corporations; and Truman A. Skinner, Esq., a Miami attorney who represented the Somoza interests in the former Panamanian and Nicaraguan owning corporations in the July 9, 1979 transactions transferring the vessels to the Cayman Island corporations. Respondents also produced a Mr. Fausto Amador, a Nicaraguan expatriate residing in Costa Rica, who had acted as Manager of Mamenic Line which owned the HONDURAS and operated the other vessels under long-term bareboat charters.

During trial, respondents offered into evidence copy of the July 20, 1979 Confiscation Decree (App.F, infra page A-34) which was authenticated by the testimony of Mr. Guttierrez as a former practicing Nicaraguan lawyer solely to establish that the vessels were irrevocably lost to the owners. The defendant Marine Risk Underwriters offered into evidence copies of Condemnation Proceedings instituted by Nicaragua in 1980 against the vessels as authenticated by the testimony of Dr. Francisco Ortega, a practicing Nicaraguan lawyer. The thrust of his testimony was to establish that the proceedings were given proper publication notice in the official Nicaraguan newspaper so that the Cayman Island owners had opportunity to reclaim the vessels.

To ascertain the true facts at trial, Judge Pollack personally examined Messrs. Guttierrez and Skinner at great length. Both witnesses also were practicing lawyers who separately represented the buyers and sellers in the transactions wherein each vessel was sold allegedly for an outright cash payment of $500,000 but neither witness saw any transfer of cash, although it would have amounted to $2,000,000 overall. Defendants stressed the issue of non-payment at trial because, although in the pre-trial stages for almost two years from September, 1979, the respondents never produced any indicia of payment or receipt of payment, despite outstanding discovery notices.

On August 31, 1981, Judge Pollack handed down a nineteen page Findings and Opinion, dismissing the Complaints and entering judgment in favor of the petitioners. Judge Pollack

held that the loss resulted from the ongoing civil war, and not from barratry, to deny coverage under the Marine Risk policy; and that the loss resulted from confiscation by Nicaragua in July, 1979, a peril excepted under the War Risk policy. He also held that the purported transfers in July, 1979 were a sham, which was ineffective even by its own devices because the cancellation of the bareboat charters to Mamenic was never established, so that Mamenic, as nationalized by the Sandinista government, would have retained the lawful right to possession of the vessels.

Respondents noticed an appeal to the Court of Appeals for the Second Circuit which eventually was argued on February 22, 1982. The respondents' argument was devoted primarily against the holding that civil war rather than barratry, was the proximate cause of loss; and secondarily against the holding that the loss was a result of confiscation by Nicaragua. On August 30, 1982, the Second Circuit handed down a thirteen page opinion affirming the District Court with respect to Marine Risk Underwriters but reversing with respect to petitioners.

The Second Circuit based its reversal primarily on the fact that the EL SALVADOR, HOPE and MANAGUA were owned by Panamanian corporations and that the District Court was not warranted in piercing those corporate veils, so as to place ownership of the vessels in Somoza and thus in Nicaragua. The Second Circuit also set aside the trial court's findings with respect to the sham transactions but instead found that the registry of all vessels was cancelled by Nicaragua on July 9, 1979, so that Nicaragua was not the country of registry with respect to any confiscation or detainment which occurred after that date. The Second Circuit made no specific finding of fact or conclusion of law with respect to the HONDURAS, which was owned by Mamenic Line, a Nicaraguan corporation.

The Second Circuit also found that the confiscation by Nicaragua was not proven so as to ratify *nunc pro tunc* the earlier taking by the crews and the detainments by Panama and Cuba because the record did not indicate that the Attorney General ever issued a confiscation order pursuant to the July 20, 1979 Decree. The petitioners had argued on appeal that (1) the Con-

fiscation Decree was offered into evidence by the plaintiffs solely to establish that their vessels had in fact been confiscated; (2) the Decree did not require the Attorney General to issue specific condemnation orders but was blanket authority to confiscate all Somoza assets; and (3) in any event, the vessels had already been confiscated as of June 17-22, 1979.

In rejecting confiscation as the cause of loss, the Second Circuit also relied substantially on the Sue and Labor argument i. e. if Nicaragua sold the vessels in 1980 under the names of the Cayman Island corporations as owners, Nicaragua could not have "confiscated" the vessels on June 17-22, 1979 (taking by the crews) or on July 20, 1979 (Confiscation Decree). The record clearly establishes that the Sue and Labor argument was advanced at trial and on appeal solely by the Marine Risk Underwriters, and never by the petitioners as alleged by the Second Circuit as a ground for reversal. Obviously, by erroneously attributing the Sue and Labor argument on appeal to the War Risk Underwriters, the Second Circuit completely failed to grasp the basic issues presented by the appeal or even to review the arguments set forth in the respective Appellee Briefs.

On September 13, 1982 petitioners filed a Petition for Rehearing which cited seventeen specific instances wherein the Court had overlooked or misapprehended the legal significance of its own findings of fact, e. g. the vessels were still under the Nicaraguan flag when "captured" or "commandeered" by the crews; respondents unsuccessfully petitioned Panama for return of the three vessels "detained" there; and the EL SALVADOR and MANAGUA were owned by Panamanian corporations when "detained" by Panama. We pointed out that the Second Circuit had failed to exercise appellate review as to the other excepted causes of loss, i. e. capture, seizure, arrest, restraint or detainment, although such review surely was dictated by the precise language used by the Court to describe what had happened to the vessels.

Indeed, by virtue of its own precise language categorizing the vessels as "detained" by Panama, we specifically requested the Second Circuit for a rehearing to reassess its entire position with

respect to the proper interpretation of the American Institute War Risk Clauses, or at the very least, to revoke its remand instructions with respect to the two Panamanian owned vessels detained by Panama. The Petition was denied without comment on November 5th, 1982 but because of the manifest injustice inflicted on petitioners with respect to the two Panamanian owned vessels, we filed a second Petition for Rehearing on November 24, 1982, which was denied, also without comment, on December 14th, 1982.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:

The jurisdiction of the District Court was invoked because of the admiralty and maritime nature of the claims being asserted by the respondents against Underwriters on policies of marine insurance.

REASONS FOR GRANTING THE PETITION:

The case presents important questions concerning the proper interpretation of the American Institute War Risk Clauses which include the insuring language at bar that has been a recurring subject of litigation in the American and English Courts for over two centuries due to the ever widening scope, and consequent rippling effect of official and quasi-official hostilities throughout the world. The case is of further importance because it directly impacts on the ever delicate question of conflicting de jure and de facto governmental rights in civil war situations and the proper approach of our Courts thereto. At this point in time, the case is of paramount importance because the same situation, foreshadowed by Nicaragua, now is clearly emerging in El Salvador, Guatemala, and Honduras, all of which dictate the highest juridical review of the American Institute policy language at bar.

As hereinafter discussed, petitioners submit that by reversing the District Court on the single issue of "confiscation", the

Second Circuit not only violated its own standard but also directly contradicted this Court, as well as other circuits, with respect to the proper extent and application of admiralty de novo review. It further misinterpreted prior holdings of this Court with respect to the proper application of the act of state doctrine; and also violated its own rules for piercing the corporate veil. Lastly, by ignoring the conclusion of the District Court as to the conflicting de jure and de facto governmental rights with respect to captured property, the Second Circuit rejected the English law cited by the District Court to support that conclusion.

(1) IMPROPER DE NOVO REVIEW

This admiralty cause was tried before an experienced trial Judge who concluded that the corporate transactions were a sham and that the vessels had already been taken from Somoza's possession by the Sandinistas when the attempted transfers were made. These conclusions, were based on the Judge's personal examination of the plaintiff's witnesses and his reasoned evaluation of their testimony. We emphasize that this was trial testimony, not deposition testimony, so any appellate attempt to overrule or ignore the Trial Court's conclusions, unless clearly erroneous, was an abuse of admiralty de novo jurisdiction (if it still exists), *McAllister v United States*, 348 U.S. 19, 20, 75 S.Ct. 6,8 (1954); *Petterson Lighterage & Towing Corporation v New York Central R.Co.*, 126 F.2d 992, 995 (2d Cir. 1942); *Crist v United States War Shipping Administration*, 163 F.2d 145, 146 (3rd Cir. 1947).

That the District Court's conclusions were not erroneous, clearly or otherwise, is more than amply demonstrated by the Second Circuit's insistence on ignoring the historical reality that General Somoza in addition to controlling Nicaragua, also controlled substantial commercial holdings; *Productos Carnic S.A. v Central American Beef and Seafood Trading Co.*, 621 F.2d 683, 685 (5th Cir. 1980). Apart from ignoring historical reality, the Second Circuit also ignored its own most recent criteria for

piercing the corporate veil in admiralty cases as earlier posited in *Kirno Hill Corp. v Holt*, 618 F.2d 982 (2d Cir. 1980) at page 985:

> "The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: Holt must have used Waterside-Pennsylvania to perpetrate a fraud or have so dominated and disregarded Waterside-Pennsylvania's corporate form that Waterside-Pennsylvania primarily transacted Holt's personal business rather than its own corporate business." (Citations omitted).

In essence, the Second Circuit's reversal was based solely on not piercing the corporate veil because, on its reasoning, if the veil could not be pierced, the July 9, 1979, transactions as to ownership and title were valid, so Nicaragua could not have been the country of ownership or registry on July 20, 1979, the date of the Confiscation Decree. To bolster its reasoning, the Second Circuit posited the absence of fraud as the basis for overruling the District Court but, in so doing, it contradicted its above quoted alternative standard for piercing the corporate veil i.e. there either must be fraud, *or* there must be complete domination. The District Court, based on its personal examination and evaluation of trial testimony, clearly found that Somoza completely dominated both the former Panamanian and Nicaraguan companies, as well as the newly formed Cayman Island corporations, which conclusion generally was in accord with the Fifth Circuit in *Carnic* (supra), and also with the Sandinistas in the Confiscation Decree.

Apart from reversing on the absence of fraud, the Second Circuit also ignored completely the District Court's finding that the vessels already had been taken from Somoza's possession before the July 9, 1979, attempt to transfer title and registry, which finding immediately raised two inevitable but obvious conclusions. Somoza had lost the vessels on June 17-22, 1979, so he had no title or registry capable of being transferred to anybody on July 9, 1979. In addition, Somoza had lost the vessels on June 17-22, 1979, so the request on July 10, 1979, to

endorse the transfer of vessel ownership onto the War Risk policy constituted a misrepresentation or concealment of material fact sufficient to constitute the fraud perpetrated on the defendants as a necessary element for warranting the District Court to disregard the corporate existence and titles even on the Second Circuit's re-edited version of its own appellate standards.

Further, by ignoring the District Court's findings, the Second Circuit led itself into the irreconcilable position of having to ignore its own findings that the vessels were "commandeered" or "seized" by the crews, and "detained" by Panama as of June 17-22, 1979, at which time all vessels were under Nicaraguan registry, and at which time two of the three vessels "detained" by Panama were owned by Panamanian corporations. Its position became further irreconcilable when it applied the doctrine of retroactive validation solely to "confiscation" while, at the same time, ignoring its own findings that the vessels were "commandeered" and "seized" and "detained". Apart from obviously misreading or not reading the Appellee Briefs by relying substantially on the Sue and Labor argument advanced by the Marine Risk Underwriters as a basis for reversing against War Risk Underwriters, the Second Circuit's own language, clearly established that at least the two Panamanian owned vessels were outside the scope of its remand instructions.

By limiting appellate review to "confiscation" and refusing to test the other excepted causes of loss against its own findings of fact, the Second Circuit violated another of its own standards for such appellate review, i.e., the judgment of a lower court may be affirmed on the basis of any argument that is supported by the record whether it was ignored by the court or flatly refused. *Mitsui & Co., Ltd., v American Export Lines*, 636 F.2d 807, 823 n. 21 (2d Cir. 1981). Having found confiscation within the exclusionary language, the District Court was not required to reach the other excepted causes of loss so they could not become an issue on appeal except to the extent that they were cited to the Court during oral argument as a further basis for affirming below. The fact so clearly spelt out the other excepted causes of loss, as evidenced by the Second Circuit's own lan-

guage, that it was clearly erroneous for those facts not to be the subject of appellate review. As already held by this Court in *Standard Oil Co., v United States*, 267 U.S. 76, 79 (1924):

> "As was said of similar facts in *Muller v Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759, 762, that the vessel and her cargo were seized, arrested and detained within the meaning of the policy we think too plain to require much more than mention."

(2) OVERRIDING IMPORTANCE TO MARINE INSURANCE COMMUNITY:

In complete consonance with the above quoted language by this Court, the petitioners agree that the precise language used by the Second Circuit to describe factually what had happened to the vessels was simply "too plain to require much more than mention". However, even though the case is still in the appellate stages, the language used by the Second Circuit already has been attacked as being ambiguous by, of all parties, the respondents herein, who were the sole intended beneficiaries of that language. To put the point in proper focus, as noted above, we attempted to file a second Petition for Rehearing on November 24, 1982 to correct the obvious injustice which was manifested by the very language of its August 30, 1982 opinion: and respondents filed an opposing Affidavit on November 30, 1982 strenuously objecting to the Petition.

We quote the language by the Second Circuit, and also by the respondents wherein they contend that the Second Circuit did not actually say what it did say:

> "It is undisputed in this case that both Cuba and Panama were opposed to the Somoza government and were actively abetting the Sandinista cause. Their activities in connection with the ship seizures indicated quite clearly that they were not about to hand the ships back to their owners. Mr. Renaldy Gutierrez, a Nicaraguan lawyer, testified that the ships could

not have been recovered from Panama or Cuba because of the ships' connection with Somoza. Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships detained there, but without success." (App. A page A-9)

Whereas respondents contended that:

"3. It should be noted that the defendants-appellees, WAR RISK UNDERWRITERS, have taken a portion of the Court's August 30, 1982 decision completely out of context. The Court did not say that two of the vessels were detained by Panama as the WAR RISK UNDERWRITERS allege in paragraph 2 of their moving affidavit. What the Court said was:

Plaintiffs' agent did petition the Panamanian Ministry of Foreign Affairs for recovery of the three ships *detained there*, but without success. 687 F. 2d 639, 644 [Emphasis added].

A reading of the decision clearly shows that this Court never found a detention by the Panamanian government within the meaning of the war risk policy exclusions nor, for that matter, did the district court. What this Court did hold is that the loss of the vessels was caused by their prior unlawful taking by the respective crews and not by anything that happened in Panama. See 687 F.2d 639, 642 *et seq.*" (Opposing Affidavit November 30, 1982). (App. G page A-36)

To rebut the out of context allegation, we quoted above the entire paragraph wherein the Second Circuit summarized its earlier findings that the Cuban authorities took over the HOPE on June 17, 1979 and the Panamanian authorities took over the EL SALVADOR, HONDURAS and MANAGUA on June 22, 1979, Petitioners never questioned the plain meaning of the Second Circuit's language but cited that language in the Petition for Rehearing (and in the Petition herein) for certain error in failing to test the facts exemplified by that language against the other excepted causes of loss in the War Risk Clauses. However

by questioning the plain meaning of that language the respondents merely resurrected the pivotal question already left unanswered for posterity by the Second Circuit:

If the vessels were not detained by Cuba and Panama in trust for the Sandinistas, then by whom and for whom were the vessels detained?

Harking back to *Standard Oil* (supra), we point out that this Court was then faced with the interpretation of "takings at sea, arrests, restraints, and detainments", in a situation wherein a neutral U.S. merchant ship was stopped and boarded by the British Navy for deviation to a British port during World War I. In 1925 this Court had no semantic problem in holding that the vessel was seized, arrested, and detained within the meaning of that insuring phrase. Yet, less than sixty years later, on similar facts, the Second Circuit can find as fact that vessels were "commandeered", "seized", and "detained" but cannot conclude as a matter of law that the vessels were lost due to "capture, seizure, arrest, detainment" within the meaning of the same generic insuring phrase.

The question presented by *Standard Oil* was whether or not a subsequent loss of the ship due to striking a rock after the taking was a marine peril or a war peril for coverage purposes. Both the District Court and the Second Circuit herein agreed that the Somoza vessels were lost as a result of the civil war but thereafter disagreed as to the interpretation of the war risk exclusionary language. However *Standard Oil* is controlling herein because it unequivocally and unambiguously spelled out that (by substituting Sandinistas for British Navy), the Somoza vessels were lost due to "capture, seizure, arrest, restraint, detainment" within the exclusionary language of the War Risk Clauses.

The adverse effect of this decision on the international marine insurance community actually is the focal point of this Petition, although its paramount importance necessarily had to abide laying a proper foundation by establishing the Second Circuit's failure to realize its inherited duty to that community. In 1925,

Justice Holmes on similar facts simply but unequivocally interpreted the language at bar, whereas in 1982, the Second Circuit's use of the same language was attacked as ambiguous practically before it was dry on the paper, by the very parties who were the sole beneficiaries of that language. If marine insurance is to maintain its traditional continuity, and if words are to have any common meaning to admiralty bench and bar, to vessel owners and marine underwriters, this Court must determine whether Justice Holmes or Judge Van Graafeiland properly interpreted that language.

(3) CONFLICTING DE JURE AND DE FACTO GOVERNMENTAL RIGHTS:

The case presented a relatively simple fact pattern involving four ships which were private assets of Somoza that were seized by the Sandinistas and taken to Cuba and Panama for safekeeping until Somoza was overthrown. Based on the evidence at trial, the District Court concluded that, having lost the vessels in June, Somoza could not have passed valid title in July *unless and until* he was victorious in the civil war. This conclusion was dismissed by the Second Circuit (App.A page A-7).

> "The district court's statement that the Cayman Islands corporations did not acquire good title to the ships, 'one that would be recognized in Court as against the new Nicaraguan Government', 521 F. Supp. at 350, is interesting but irrelevant conjecture. The Nicaraguan Government is not a party to this action. *See Pelton v. Westchester Fire Insurance Co.*, 77 N.Y. 605 (1879)."

By rejecting the District Court's conclusion as "interesting but irrelevant conjecture", solely on the authority of a century old New York case construing equitable interest in property for fire insurance purposes, the Second Circuit again illustrated its failure to grasp the root issue of this case. For comparison purposes, we quote the reasoning upon which the District Court's conclusion was based:

> Somoza's attempt to transfer the corporate titles and registrations of the four ships in order to avoid the effect of this clause was ineffective and a sham. The ships had already been taken from Somoza's possession by the Sandinistas when this attempt was made. As the Privy Council noted in *Civil Transport Incorporated v. Central Air Transport Corporation* (1953) A.C. 70, 2 Lloyd's Reg. 209 (Privy Council)
>
> Subsequent recognition de jure of a new government [the Sandinista Government] as the result of successful insurrection can in certain cases annul a sale of goods by a previous government [Somoza]. If the previous government [Somoza] sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government [Somoza] never regains the goods and the de facto new government becomes recognized. . . . as the de jure government, purchasers from the old government [Somoza] will not be held in her Majesty's courts to have a good title after that recognition. *Id.* at 93." (App. B page A-24)

In practical effect, the District Court was equating its own reasoning on the Somoza/Sandinista civil war with the earlier reasoning of the Privy Council on the Nationalist/Red China civil war because each case involved parallel fact patterns. The District Court and the Privy Council merely reiterated the simple historical fact that, in civil war situations, winners take all; and the Sandinistas had taken Somoza's ships. Viewed against historical reality, the Second Circuit's conclusion was an interesting but irrelevant non sequitur.

The Second Circuit's reasoning was even more irrelevant in questioning the subsequent actions of the Sandinista government vis-a-vis the Confiscation Decree and the Condemnation

Proceedings. After having the Decree entered into evidence at trial solely to prove that the vessels were confiscated, appellants argued on appeal that the Decree was only an "enabling" statute, which required further actions by the Attorney General to "implement" confiscation. The Second Circuit obviously was sufficiently impressed by this argument to overrule the District Court by decrying the Attorney General's failure to issue a confiscation order. As a basis for seeking such order it invoked the authority of this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401-403 (1964).

However the authority was invoked in vain because *Banco* as pointed out by this Court in its preamble remarks at page 401, involved an entirely different breed of statutory reprisal:

> "The law gave the Cuban President and Prime Minister discretionary power to nationlize by forced expropriation property or enterprises in which American nationals had an interest".

By any fair reading, the Nicaraguan Confiscation Decree did not give the Attorney General discretionary authority in view of the fact that it used the phrases "immediately proceeding" and "all the assets", which certainly are not discretionary suggestions in a totalitarian regime. By the same token, the Attorney General did not have to confiscate the ships as they already had been captured, seized, arrested, restrained, and detained by the crews and by Cuba and Panama, awaiting the day when such a Confiscation Decree could be issued. To which the Second Circuit apparently agreed:

> "The ships remained in Cuba and Panama until after the Sandinistas gained complete control of the Nicaraguan government." (App. A page A-3)
>
> "The commandeered vessels were taken into the waters of nations known to be friendly to the revolutionary cause, and were returned to Nicaragua only after Somoza was ousted, and the Sandinistas were in control. Moreover, it is evident from the concerted nature of the activities that the seamen acted under orders from a central authority." (App. A page A-5)

Despite its definitive and unequivocal findings of fact with respect to the fate of the vessels the Second Circuit, for whatever reason, refused to equate these findings with the known facts of history and the accepted rules of international warfare. Cuba never recognized Somoza; Panama recognized the Sandinista Junta on June 22, 1979; and the United States never ceased recognition of Nicaragua during the Somoza regime through the Sandinista regime to date. Therefore, in practical effect, and the United States Department of State notwithstanding, the Second Circuit refused to recognize Nicaragua as of July 20, 1979 because the Attorney General did not issue a confiscation order pursuant to the Confiscation Decree which did not require such an order in the first instance.

The simple fact of the matter is that the vessesls were irrevocably lost to Somoza as of June 17-22, 1979 on which dates all vessels were under the Nicaraguan flag. The vessels were returned by Cuba and Panama to the Sandinista government of Nicaragua in August, 1979, which constituted *nunc pro tunc* retroactive validation of the "capture, seizure, arrest, restraint, detainment or confiscation" of the vessels by the Sandinista crews, Cuba and Panama on June 17-22, 1979. What the Sandinista government chose to do with the vessels in 1980 was not a matter about which the Second Circuit was permitted to speculate for purposes of overruling the District Court. The saddest commentary on the futility of its speculation was uttered by the Second Circuit in summing up its conclusions of the sue and labor argument (which was never argued by War Risk Underwriters):

> "Assuming that the insureds' representatives could have entered Nicaragua safely***". (App. A, page A-9)

That utterance sums up the complete irrelevance of the Second Circuit's opinion because it conclusively proves that the vessels were irrevocably lost to Somoza as soon as the vessels were taken by the crews to Cuba and Panama. (see App. D pages A-28,29)

The undisputed fact of the matter is that it did not make the slightest difference in the world to Somoza or to the Sandinistas,

or to Cuba or to Panama, or to the crewmembers, that the Attorney General did not issue a confiscation order because all these vitally interested parties knew that the vessels were long gone from Somoza. The studied bewilderment in August, 1982 concerning the executive competence of the Attorney General of Nicaragua for allegedly failing to implement a Confiscation Decree of the Nicaraguan government with respect to property within Nicaraguan territory, which was used by the Second Circuit as its basis for overruling the District Court, not only violates the act of state doctrine but, in the same breath, nullifies the principle of retroactive validation. Again, the studied failure of the Second Circuit to come to grips with legal and historical reality is summed up in its own, almost jocular language commenting on the demise of General Somoza:

> "Association with the deposed Nicaraguan regime apparently was not conducive to longevity" (App. A pages A-8, 9),

which was probably intended to convey that, with lives as well as with ships, the Sandinistas always played for keeps.

In summary, the Second Circuit for reasons of its own, elected to reverse an experienced trial judge by reaching contrived conclusions of law which were negated by its own findings of fact, particularly with respect to the two Panamanian owned vessels. Unfortunately the case, rather than being limited to a contractual dispute between U.S. residents over property within the jurisdiction of a U.S. Court, presents paramount questions on conflicting de jure and de facto governmental rights, the determination of which directly impacts on the entire international marine insurance community. Instead of meeting its obligation to that community by interpreting the policy language prepared by the American marine insurance community to deal with those conflicting governmental rights, the Second Circuit evaded its obligation by reversing below on language which was immediately attacked as ambiguous by the intended beneficiaries of that language.

More importantly, if permitted to stand, the decision will only leave a legacy of confusion for future generations of admir-

alty bench and bar, and vessel owners and marine underwriters. If the decision be permitted to stand, the only possible inference to be drawn is that our appellate courts are neither desirous nor capable of rendering an authoritative interpretation of the language of American marine policies which are thrown into the mainstream of international commerce. The American marine insurance community can only hope that, if the decision be permitted to stand, the American courts and the world in general will little note nor long remember what was said there.

CONCLUSION:

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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